


January 21, 2019

VIA Email



Re: my-washingtonpost.com

Dear Mr. 

I represent the Yes Men in connection with the above-listed domain name and related actions on January 16, 2019. I have reviewed your letter demanding that the site be shut down and all distribution all physical copies of the spoof newspaper end.

We are frankly disappointed that the Washington Post has chosen to take this approach. Given the content of the site and the physical paper, and the ample publicity the spoof has generated, it is difficult to imagine that any member of the public would be confused. Moreover, given the Washington Post's long history of defending free speech and fair use, we had hoped that your paper would recognize that the spoof site is entirely legal critical speech.

Trademark Issues

The Post does not have a valid trademark complaint. First, the site is fully protected by the nominative fair use doctrine. *See, e.g. Century 21 Real Estate Corp. v. Lendingtree*, 425 F.3d 211, 218-221 (3d Cir. 2005); *New Kids on the Block v. New America Pub.*, 971 F.2d 302, 308 (9th Cir. 1992). Indeed, courts have noted that nominative fair uses are particularly likely to be found in parodies. *Radiance Foundation, Inc. v. NAACP*, 786 F.3d 316, 327-333 (4th Cir. 2015), *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 808 n.14 (9th Cir. 2003). Second, the spoof is sheltered by the First Amendment. *See Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 423 (1st Cir. 2007); *Cliff Notes v. Bantam Doubleday Dell Publ'g Group*, 886 F.2d 490, 495 (2d Cir. 1989); *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456 (4th Cir. 2000); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 906 (9th Cir. 2002). Third, the site is noncommercial; it is obviously intended to raise political awareness, not to sell or advertise goods or services. Therefore, it is beyond

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the reach of the Lanham Act. See 15 U.S.C. §§ 127, 1125; *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2014); *Utah Lighthouse Ministry v. Found. For Apologetic Information and Research*, 527 F.3d 1045, 1052-53 (10th Cir. 2008); *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005); *Taubman v. WebFeats*, 319 F.3d 770, 774 (6th Cir. 2003); *CPC Int'l*, 214 F.3d at 461. Finally, with respect to any dilution claim you believe you may have, please note that news commentary is also exempted from the dilution statute (in addition to the noncommercial use and fair use exemptions). See 15 U.S.C.A. §1125(c)(3).

As for your concern that the site does not include a disclaimer, trademark law does not require any such thing. The parodic nature of the site is evident on its face, and there has been ample press coverage to dispel any momentary confusion – including both my client’s own press release and the Post’s own reporting and commentary. There was never any opportunity for confusion to lead to a mistaken purchasing decision of any kind – the type of confusion that is the subject of trademark law. See, e.g., *Radiance*, 786 F.3d at 324.

Copyright Issues

With respect to your allegations of unauthorized copying, the site is obviously designed for purposes of criticism and comment and protected by the fair use doctrine. 17 U.S.C. § 107 (“the fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright.”). Any use my clients may have made of material copyrighted by the Washington Post is highly transformative. See generally *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994) (“[Transformative] works . . . lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . parody has an obvious claim to transformative value”); *Castle Rock Ent. v. Carol Pub. Group, Inc.*, 50 F.3d 132, 141 (2d Cir. 1998) (A transformative work “is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

Further, my clients copied no more than necessary for purposes of the parody. As the Supreme Court has recognized, parodies must often use substantial portions of an original work to make their point. *Campbell*, 510 U.S. at 588; see also *Mattel*, 353 F.3d at 803 n.8 (holding that “entire verbatim reproductions are justifiable where the purpose of the work differs from the original.”)

Finally, critical transformative uses rarely if ever supplant markets for the original material. *Campbell*, 510 U.S. at 591-92; see also *Harper & Row v. Nation Enters.*, 471 U.S. 539, 567-69 (1985). In this case, the website is plainly not a substitute for the original, nor does it invade any licensing market for the Post’s copyrighted works.

More broadly, the website serves the public interest by advancing political criticism and debate on the several pressing political issues. Nimmer on Copyright, § 13.05[B][4] (‘the

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public interest is also a factor that continually informs the fair use analysis."); *see also Sony v. Universal*, 464 U.S. 417, 431-32 (1984) ("courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."); *Mattel*, 353 F.3d at 806 ("the public benefit in allowing . . . social criticism to flourish is great.").

Accordingly, my clients decline to meet your demands. That said, in the interests of resolving this matter amicably, my client has removed all links to washingtonpost.com.

If you have any further concerns, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Corynne', with a long horizontal flourish extending to the right.

Corynne McSherry
Legal Director
Electronic Frontier Foundation